

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PIERCE COUNTY, DEPARTMENT OF
PUBLIC UTILITIES and CITY OF
BONNEY LAKE,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 92-192/103

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

All three parties filed Motions for Summary Judgment in this matter. Having reviewed the prior record and the following documents:

- (1) Respondent DOE's Motion for Summary Judgment and Memorandum in Support thereof;
- (2) Pierce County's Response to DOE's Motion;
- (3) City of Bonney Lake's Objection to DOE's Motion;
- (4) DOE's Reply to the County's Response and Bonney Lake's Reply;
- (5) Pierce County's Motion for Summary Judgment and Memorandum in Support thereof;
- (6) City of Bonney Lake's Motion for Summary Judgment with Argument and Authorities included;
- (7) DOE's Response to Appellants' Motions;
- (8) Pierce County's Rebuttal to DOE's Response;
- (9) City of Bonney Lake's Reply to DOE's Response; and

Having heard oral argument from parties, the Board makes the following

ORDER - SUMMARY JUDGMENTS

1 FINDINGS OF FACT

2 I

3 On or about November 27, 1991, the City of Sumner (Sumner) which
4 is not a party to this action, filed an application with the
5 Department of Ecology (DOE) for a National Pollutant Discharge
6 Elimination System (NPDES) permit to discharge treated wastewater into
7 the state water from a sewage treatment plant (STP) located in Sumner.

8 II

9 Under an Intergovernmental Agreement (the Agreement) between the
10 City of Sumner, Pierce County (the County) and the City of Bonney Lake
11 (Bonney Lake), the County and Bonney Lake discharge untreated sewage
12 into the Sumner STP. The treated sewage from all three sources,
13 Sumner, the County, and Bonney Lake, is then discharged into the White
14 River. The Agreement allocates maintenance and operational
15 responsibilities for the sewage system components to the parties to
16 the Agreement which own the components.

17 III

18 On September 23, 1992, DOE issued NPDES Permit No. WA-002335-3 to
19 "The City of Sumner and Contributing Jurisdictions", those
20 contributing jurisdictions being Pierce County and Bonney Lake. The
21 County's appeal, filed with the Board on October 23, 1992, contests
22 its being named on the Permit as a co-permittee, and Bonney Lake's
23 appeal, raising the same issue with regard to its being so named, was
24 filed on November 4, 1992.

25
26 ORDER - SUMMARY JUDGMENTS

1 IV

2 On October 23, 1992, the County filed a Motion and Memorandum in
3 Support of Partial Stay, and Bonney Lake filed a similar Motion on
4 November 4, 1992. The Board's Order denying stay on one issue and
5 granting stay on the other issue is a matter of record herein.

6 V

7 The three Motions for Summary Judgment were filed by Bonney Lake
8 on June 2, 1993, by DOE on June 7, 1992, and by the County on June 9,
9 1993. All three Motions ask for judgment on the same two issues which
10 will be discussed separately below.

11 VI

12 Any Conclusion of Law which is deemed to be a Finding of Fact is
13 hereby adopted as such. From these Findings of Fact, review of the
14 record and the Motion document filed herein, and the argument of
15 counsel, the Board makes these

16 CONCLUSIONS OF LAW

17 I

18 The Board has jurisdiction over the parties and the subject
19 matter of this action. RCW's 43.21B.110, 90.48.120.

20 II

21 The Board's decision to grant or deny the Summary Judgment
22 Motions will be governed by the following criteria as found in Hubman
23 v. King County and DOE, SHB No. 91-40, citing CR 56:

1 (1) Summary judgment shall be rendered if (the record shows)
2 that there is no genuine issue as to any material fact, and the moving
3 party is entitled to judgment as a matter of law; and

4 (2) Evidence must be considered in the light most favorable to
5 the nonmoving party.
6

7 III

8 We conclude that there are no genuine issues as to any material
9 facts, and that, after considering all the evidence in the light most
10 favorable to the nonmoving party/parties, the issues, as defined by
11 Appellants and considered in the following paragraphs, can be decided
12 as a matter of law.
13

14 IV

15 DOES DOE HAVE THE STATUTORY AUTHORITY TO NAME THE APPELLANTS
16 AS CO-PERMITTEES IN THE NPDES PERMIT?

17 Appellants claim, in effect, (1) that Permits are required only
18 when a municipality operates a sewage treatment system which
19 discharges into the waters of the state, (2) that Appellants discharge
20 their waste into the Sumner STP, not directly into the waters of the
21 state (the White River), and (3) that, therefore, Appellants are not
22 subject to the permit requirements and should not be named as
23 co-permittees.
24

V

The general requirement for waste water discharge permits is found in RCW 90.48.160:

Any person who conducts a commercial or industrial operation of any type which results in the disposal of solid or liquid waste material into the waters of the state, including commercial or industrial operators discharging solid or liquid waste material into sewerage systems operated by municipalities or public entities which discharge into public waters of the state, shall procure a permit from the department...PROVIDED, That this section shall not apply to any person discharging domestic sewage only into a sewerage system.

VI

The word "person" is defined by RCW 90.48.020 as, among others, "any...municipality". By this definition, if RCW 90.48.160 stood alone, the Appellants could possibly be exempted, as "persons" from the general permit requirement. However, this is not the case.

VII

In 1972, the Legislature enacted RCW 90.48.162 which is "intended to extend the permit system of RCW 90.48.160 to counties and municipal or public corporations...":

Any county or any municipal or public corporation operating...a sewerage system, including any system which collects only domestic sewerage, which results in the disposal of waste material into the waters of the state shall procure a permit from (DOE) before so disposing of such materials.

The question then is whether the Appellants (along with Sumner) operate a system which collects domestic sewerage and which results in disposal of the waste material into the White River.

VIII

We turn to 173-220 WAC, NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT PROGRAM, and its subsections as noted:

-040(1) Any person presently discharging pollutants to surface waters of the state must file an application with (DOE)...

-030(5)) ... "discharge of pollutants" means (a) any addition of any pollutant or combination of pollutants to surface waters of the state from any source point... (emphasis ours.)

-030(19) "Pollutant" means...sewage...

-030(18) "Point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ...from which pollutants are or may be discharged. (our emphasis.)

-030(8) "Domestic wastewater facility" means all structures, equipment, or processes required to collect, carry away, treat, reclaim or dispose of domestic wastewater... (our emphasis.)

-030(7) "Domestic wastewater" means water carrying human wastes, including kitchen, bath, and laundry wastes from residences, buildings, industrial establishments or other places..."

IX

The Board concludes that the County and Bonney Lake sewage pipes are source points to collect and carry away domestic wastewater to the Sumner STP, that the pipes therefore are part of a domestic wastewater facility which, through the STP, discharges pollutants into the waters of the State, that, therefore, the County and Bonney Lake require a waste water discharge permit.

X

We also have consistently held that 90.48 RCW is a strict

1 liability statute and that neither intent nor negligence is relevant
2 (Spackman v. Doe, PCHB 91-122 (1992)), and that liability thereunder
3 cannot be contracted away. Leary v. Doe, PCHB 90-1 (1990).
4 See also Sea Farms, Inc. v. Foster and Marshall Realty, Inc., 42
5 Wn.App. 308 (1985).

6 Appellants argue that they should not be named on the permits
7 because their waste is not discharged directly into State waters but
8 first passes through the STP where it is treated. If this reasoning
9 were valid, then Sumner itself would not require a permit because its
10 waste is also treated before going into White River. On the contrary,
11 the purpose of the permit is to assure that sewage from all source
12 points is properly treated before being discharged into the River, a
13 responsibility that the County and Bonney Lake cannot contract away to
14 Sumner.

15 XI

16 Appellants also argue that affirming DOE in this instant matter
17 will result in DOE's requiring permits from schools and other
18 statutory municipal corporations resulting in an unwieldy bureaucratic
19 disaster which would be detrimental to the public. Even if we were to
20 consider that such an unfavorable result could or would emanate from
21 this decision, the situation posed by Appellants is purely speculative
22 and cannot be relied on to defeat a motion for summary judgment.
23 Kyreacos v. Smith, 89 Wn.2d 425,429 (1977).

1 XII

2 In summary, we conclude that DOE properly named the County and
3 Bonney Lake as co-permittees with Sumner.

4 XIII

5 DOES DOE HAVE THE AUTHORITY TO INCLUDE CONDITION S14
6 IN THE PERMIT?

7 Condition S14 requires that the Agreement and amendments thereto
8 must be reviewed and approved by DOE prior to their implementation.

9 XIV

10 In our Order granting Appellants' Motion for Stay on this same
11 issue, we considered that the language of the Condition S14 at that
12 time was overly broad with regard to DOE's right to review future
13 amendments to the intergovernmental agreement and exceeded DOE's
14 authority.

15 XV

16 Subsequently, by letter dated January 6, 1993, DOE modified
17 Condition S14 to require that only the provisions "related to the
18 control and prevention of pollution of waters of the state are hereby
19 incorporated and made an enforceable condition of this permit", that
20 DOE shall review "all amendments related to the control and prevention
21 of pollution of waters of the state...", and that "No amendments
22 related to the control and prevention of pollution of waters of the
23 state shall be effective until Ecology has provided written
24 notification to all parties that the amendment is acceptable."

1 XVI

2 By the above amendment to Condition S14, DOE has restricted
3 itself to the review and approval of only those provisions which
4 legally fall within the statutory purpose of controlling and
5 preventing the pollution of waters of the state. RCW 90.48.020.

6 XVII

7 Appellants urge that the limitations stated above in the revised
8 Condition S14 are too vague to be properly enforceable. We do not
9 agree. To list specifically future amendments which would or would
10 not be subject to DOE review would be a speculative and impossible
11 task. Such a determination can be made only as the amendments are
12 submitted. Appellants will not be left without a remedy since, in any
13 specific instance, DOE's denial would have to take the form of an
14 order which Appellants will have the right to appeal at that time.

15 XVIII

16 We conclude that Condition S14, as revised, is properly
17 incorporated into the permit.

18 XIX

19 Any Finding of Fact deemed to be a Conclusion of Law is
20 incorporated herein. From these Conclusions of Law, the Board enters
21 the following
22
23
24
25

1 ORDER

2 THAT the Department of Ecology's Motion for Summary Judgment is
3 GRANTED as to both issues;

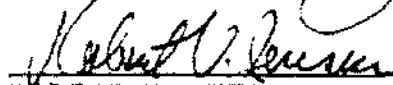
4 THAT the Pierce County and City of Bonney Lake Motions for
5 Summary Judgment are both DENIED; and

6 THAT the appeals PCHB Nos. 92-192 and 92-203 are both dismissed
7 with prejudice.


8 Done this 26th day of July, 1993

11 POLLUTION CONTROL HEARINGS BOARD

12 
13 HAROLD S. ZIMMERMAN, Chairman

14 
15 ROBERT V. JENSEN, Attorney Member

16 
17 RICHARD C. KELLEY, MEMBER

18
19 JOHN H. BUCKWALTER 
20 Administrative Appeals Judge
21 Presiding